UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ECDO, INC., EARLY CHILDHOOD DEVELOPMENT CENTER

and **Case Nos. 2-CA-38482**
2-CA-38929

LOCAL 205, DC 1707, AFSCME, AFL-CIO

Simon-Jon H. Koike Esq., Counsel for the General Counsel
Thomas M. Murray, Esq., Counsel for the Union
Richard K. Muser, Esq., Counsel for the Respondent

DECISION

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York on December 16, 2008. The charge in 2-CA-38482 was filed on October 10, 2007 and the charge in 2-CA-38929 was filed on August 18, 2008. An initial Complaint was issued on July 30, 2008 and a subsequent Consolidated Complaint was issued on November 19, 2008. In substance the allegations were:

1. That since April 20, 2007, (six months prior to the filing of the charge in 2-CA-38482), the Respondent has failed to pay wage increases that were required under the terms of a collective bargaining agreement that was in effect from July 6, 2004 through July 1, 2008.

2. That the aforesaid failure to comply with the contract was made in the absence of consent by the Union and therefore is a violation of Section 8(d) and 8(a)(5) of the Act.

3. That on or about July 31, 2008, the Respondent unlawfully withdrew recognition from the Union.

At the hearing the parties entered into a Settlement of Case No. 2-CA-38929 whereby, the Respondent agreed to resume collective bargaining with the Union. Consequently, the General Counsel moved to sever that case from the instant proceedings and I granted the Motion.

The only issue remaining is the contention that the Respondent has violated Sections 8(a)(1) & (5) and 8(d) by failing to pay the contractually required wage increases during the term of a collective bargaining agreement that were scheduled for July 1, 2006 and July 1, 2007. The Respondent does not dispute the non-implementation of the wage increases at the contractually set times. It does contend, however, that the Complaint is barred by Section 10(b) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice

The Respondent is a not-for profit enterprise that operates a day care center in Manhattan. For some years, the Union has represented certain employees of the Respondent in the following appropriate unit:

> All full-time and regular part-time group teachers, assistant teachers, teacher aides, cooks, cook's assistants, and receptionists/office assistants employed by the Respondent but excluding Executive Directors, Center Directors, Education Directors, Fiscal Directors and Supervisors.

The last collective bargaining agreement ran from July 6, 2004 through July 1, 2008. The agreement at Article 4, Section 1, provides for annual wage increases on July 1, 2005, July 1, 2006 and July 1, 2007.

Notwithstanding the terms of the contract, the Respondent failed to implement the wage increase for July 1, 2005. This resulted in an arbitration proceeding where the Company claimed an inability to pay. On January 9, 2006, the arbitrator found against the Respondent and ordered it to pay the wage increase. The Company complied.

By letter dated April 18, 2006, Janice Berthoud, the Respondent's Executive Director wrote to Raglan George Jr., the Executive Director of the Union. She stated, inter alia:

> Mr. George, the day care program is operating with a deficit of more that $17,000 every month. This expense is quickly mounting. A 4% wage increase was awarded the employees as per the Arbitrator's Award and Opinion dated January 9, 2006 despite the agencies operating deficiencies. The agreement calls for an additional 4.5% wage increase to take effect July 1, 2006. According to Mr. Huff this is contrary to the Collective Bargaining Agreement governing the members of Local 205.
>
> It is imperative that we address this matter or face certain bankruptcy.

When July 1, 2006 rolled around, the Respondent failed to put into effect the wage increase that was called for on that date. In this regard, the Respondent's Executive Director, Janice Berthoud, reached out to the Union in order to explain the Respondent's situation and the need to renegotiate the contract. She also held a meeting with the employees and explained that the Company could not, at that time, afford to implement the wage increase. By letter dated July 7, 2006, she wrote to the employees as follows:

> Some weeks ago, I met with the staff to discuss the difficult financial position facing the Day Care Center. At that time I discussed some options that we were considering in order to keep the center open. We spoke about a meeting that I

> had with the management of DC 1707. Present at the meeting were Raglan George, Executive Director, Luz Santiago and others who assured me that every effort would be made to work with the agency and its members, regarding renegotiating the current contract to avert the wage increase effective July 1, 2006. I had hoped that you would have heard from the union to discuss amending or renegotiating this clause but regrettably they have not done so.
>
> Effective July 3, 2006, we increased the tuition. This increase, while it is clearly a burden to many of the families that we serve, is only enough to cover our current operating expenses. It is not enough to cover the accumulated debt or support an additional wage increase. Starting September 2006, we will also reduce expenses and increase revenue by amending the age of children enrolled from two months to 1 year. We will continue to aggressively pursue funding or grant opportunities that are available to day care and early childhood education.
>
> In closing I want to thank you for you hard work and continued support.

I note that according to the testimony of Ms. Berthoud, the Union never actually agreed to waive the contract in terms of the wage increase requirements and never actually agreed to renegotiate the terms of the contact. I also note that the evidence shows that the Respondent did not unambiguously notify the Union or the employees that its failure to pay the wage increases was permanent. Indeed, Ms. Berthoud testified that had she been successful in obtaining other funding or sources of revenue, she would have paid the required increases.

The next pay increase of 5% was scheduled to be implemented on July 1, 2007. This also did not happen. On July 20, 2007, employees sent a memorandum to Berthoud stating:

> As you know, we were due a raise of 4.5%, effective July 2006 and a 5% raise, effective July 2007. To date we have not received either. We understand the financial situation our organization has faced and we have done all we can to lend our support. However, we have not heard anything concerning this matter and we are requesting a meeting with you as soon as possible to disuses this further.

When no satisfactory resolution was made, the charge in 2-CA-38482 was filed on October 10, 2007. Subsequently, the Respondent did implement a 5% wage increase on February 1, 2008 but this was on top of the 2005 raise and not on top of the required 2006 raise.

Analysis

Among other things, Section 8(d) of the Act provides that when a contract is made between a union and an employer, the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract…" The purpose of this provision, (enacted to modify the decision in *NLRB v. Sands Mfg. Co*., 306 U.S. 332. 342), was to insure a degree of stability once the parties to a collective bargaining relationship have established a contract for a fixed term. (A bargain made is a bargain that must be kept). For example, if the parties agreed that employees were to receive a defined wage increase at a

defined period of time, neither the Company nor the Union could require the other to bargain for a modification of that agreement during the life of the agreement.[1] To allow either to require the other to bargain about an issue that had been set for a fixed period of time, would, in a sense, make the agreement somewhat illusory and insert a degree of instability into the relationship between the parties. (There is, however, nothing unlawful if both parties to a collective bargaining agreement voluntarily and mutually agree to a mid-term modification).

I also note that in cases such as this, a defense asserting a financial inability to pay is not valid even if true. *Mac Plastics*, 314 NLRB 163 (1994). It is not within the jurisdiction of the Board to modify the terms of a collective bargaining agreement. To the extent that this can be done, it can only be done by the consent of the parties, or in the absence of consent, in a Bankruptcy proceeding. In this regard, I conclude that the Respondent's evidence fails to prove that the Union consented to the contract being modified.

Notwithstanding the above, the Respondent contends that even though it did not implement the 2006 and 2007 contractually required wage increases, the Complaint in this case should be barred by the statute of limitations provisions set forth in Section 10(b) of the Act.

Had the employer announced, either to the Union and/or to the employees, on or before April 10, 2007, that its intention was to repudiate the collective bargaining agreement, the Respondent would have a reasonable basis to assert that Section 10(b) would bar the Complaint because the charge would not have been filed more than six months after such a repudiation.

But that is not the case. While the Employer did not implement the July 2006 wage increase, the evidence shows that when the employees were notified of this action, they were not told that it was the Respondent's unequivocal intention either to repudiate the entire contract or even to repudiate only the wage increase provisions thereof. Instead, Ms. Berthoud took the more reasonable approach of advising employees that although it could not afford to make the payments, she hoped that this was temporary and that the Respondent would do all it could to pay the raises when that was possible.

When an identifiable act is committed outside the 10(b) period and only its consequences continue into the 10(b) period, the Board will find an allegation untimely. Thus, where a collective-bargaining agreement is clearly and totally repudiated, a theory that there is a continuing violation is inapplicable. *A & L Underground, 302 NLRB 467-468 (1991); American Automatic Fire Protection*, 302 NLRB 1014, 1015 (1991).

On the other hand, where it is alleged that a material contract breach has occurred, a Complaint will be timely, even when there have been previous breaches outside the 10(b) period, but where a *clear and unequivocal repudiation* has only occurred within 6 months of the charge being filed. *Farmingdale Iron Works*, 249 NLRB 98-99 (1980), enfd. 661 F.2d 910 (2d Cir., 1981); *A & L,* supra, 302 NLRB at 469.

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[1] Not only may either party refuse to enter into negotiations to modify a contract during its mid-term, but either may violate the Act if it attempts to impose contract changes on the other. Thus, in *NLRB v. IBEW, (Burroughs Corp.),*126 LRRM 2373 (2nd Cir. 1987), a union violated Section 8(b)(3) & 8(d) of the Act by threatening to strike to obtain a mid-term re-negotiation of a contract. Similarly, in *St. Vincent's Hospital*, 320 NLRB 42, (1995), an employer violated the Act by unilaterally implementing, without the union's consent, a new insurance plan to replace one to which the Union had orally agreed. See also, *Mead Corp*., 318 NLRB 201 (1995).

In cases such as this, (involving the failure to make contract payments), Section 10(b) does not begin to run until the Respondent gives unequivocal notice that it does not intend to honor the contract. *Republic Die and Tool Co*., 343 NLRB 683, (2004).

In light of the above, I cannot conclude that the Complaint should be barred as untimely *vis a vis* the allegation that the Respondent unilaterally and without consent modified the contract by failing to implement the July 1, 2006 wage increase inasmuch as the Respondent, although failing to make the payments, did not give either the Union or the employees clear and unequivocal notice of its intention to repudiate the collective bargaining agreement or even that portion of the contract.

In my opinion, the Respondent's reliance on *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007) is inapposite. For one thing, the Court's majority opinion in *Lebetter* dealt with the interpretation of a different statute and therefore its interpretation of Title VII's limitations bar, is not necessarily translatable to the NLRA's Section 10(b).

In that case, the plaintiff, (Ledbetter), was faced with a discrete and unequivocal act that occurred within the limitations period. That was a pay decision, (in 1998), that was not alleged to have been, by itself, discriminatorily motivated. Her contention was that even so, this final pay decision was unlawful because it carried forward intentionally discriminatory disparities from prior years. She also contended that even though the evidence of discriminatory motivation occurred outside the limitations period, each separate pay check that she received, including those received during the limitations period, constituted a separate act of discrimination.

In the absence of a claim of fraudulent concealment, the fact is that Ledbetter was on notice of the various pay evaluation decisions that took place during her employment and each, including the final one, was discrete, and unambiguous. Unlike the present case, where the Union and employees, *because of the Respondent's communications*, were not really certain as to whether or when they might receive the contractual wage increases, there was no equivalent certainty. Ledbetter was notified on specific dates that she was receiving specific amounts of money as a result of specific pay decisions. Indeed, Lebetter's case is more analogous to a typical 8(a)(3) discharge case where an employee has been notified that he or she has been discharged on a date certain. In such a case, he or she must file an unfair labor practice charge within six months of the date of the discharge. There is no extension of time to gather evidence, and if some piece of evidence showing motive is obtained after six months, that does not give the potential discriminate additional time to file a charge. In that circumstance, a Complaint based on a charge filed outside the statute of limitations period will be dismissed if the 10(b) defense is raised by the Respondent. (The Board considers Section 10(b) to be an affirmative defense that has to be timely raised by a Respondent).

With respect to the failure to comply with the contract's July 1, 2007 wage increase, the charge would not be barred inasmuch it was filed within six months of that date.

Conclusions of Law

1. By withholding annual wage increases to employees on July 1, 2006 and July 1, 2007, the Respondent violated Section 8(a)(1), & (5) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) & (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In accordance with precedent, I am going to recommend that the Respondent make whole the employees in the bargaining unit for any losses that they suffered because of its failure to implement the wage increases called for in the collective bargaining agreement. Nevertheless, because of Section 10(b), the Board cannot require the Respondent to reimburse employees from July 1, 2006 to March 31, 2007, because that period is more than six months before the charge was filed. Instead, I shall recommend that the Respondent be ordered to make the employees whole from April 1, 2007.

Although the General Counsel is seeking an Order calling for the payment of interest on a compounded basis, I shall not grant this request inasmuch as that is contrary to current law. Therefore, the Order should require that the amounts be computed on a quarterly basis as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Respondent, Ecdo Inc., Early Childhood Development Center, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Withholding contractually required annual wage increases to employees

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, from April 1, 2007, the employees who were not given annual wage increases that were withheld in 2006 and 2007.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix ."[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 1, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.,, February 5, 2009.

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Raymond P. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT withhold contractually required annual wage increases to employees

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole the employees in the bargaining unit for our failure to pay them the contractually required wage increases called for in the collective bargaining agreement that was in effect in 2006 and 2007.

ECDO, Inc., Early Childhood Development Center
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.